

**THIS TELECOMMUNICATIONS LICENSE** is issued by and between the City of Durham; a North Carolina municipal corporation, hereinafter known as "the City" and **MCNC**, authorized to do business in North Carolina, hereinafter known as "Licensee".

**WHEREAS**, the City possesses property interests in the Public Way in the City and is responsible for protecting the public's investment in such Public Way and ensuring that the use of such Public Way by non-City users does not increase the public cost of maintaining the Public Way or interfere with the provision of utility service or the operation of the road network or traffic;

**WHEREAS**, the City is responsible for ensuring that current and future providers of Telecommunications Services will have access to the Public Way in accordance with Section 253 of the federal Communications Act, 47 U.S.C. § 253;

**WHEREAS**, Licensee wishes to construct a Telecommunications System along portions of the Public Way in the City;

**WHEREAS**, consistent with applicable law, the City desires to manage the Public Way and obtain fair and reasonable compensation from Persons providing Telecommunications Services for the use of the Public Way on a non-discriminatory basis, to the fullest extent permitted by law;

**WHEREAS**, the City intends to exercise, to the fullest extent permitted by applicable law, its authority with respect to the regulation of the occupation and use of the Public Way in connection with the provision of Telecommunication Services;

**WHEREAS**, in response to the Licensee's request for a telecommunications license agreement, the City has agreed to grant a Telecommunications License to the Licensee to place facilities in the public way with proper approvals from the City.

**NOW, THEREFORE**, the City hereby grants to Licensee a Telecommunications License setting forth the conditions under which Licensee may place Telecommunications Facilities in the Public Way in the City. This License is subject to all present and future requirements of applicable federal, state and local laws, codes, regulations, and policies.

## **Section 1. Nature of Grant and Term**

- A. The City hereby permits the Licensee, subject to the terms and conditions of this Telecommunications License, to occupy and use the Public Way to construct, install, operate, upgrade, repair, maintain and remove Telecommunications Facilities used to provide Telecommunications Services upon, along, over and under the Public Way in the City. The term of this License shall commence on the date this License is executed by both parties and shall terminate the effective date of any superseding Telecommunications Franchise or license executed by the City and the Licensee, or unless this Telecommunications License is sooner forfeited pursuant to Section 11. This Telecommunications License may be extended

by agreement of the City and Licensee. This License is granted subject to the City's right to impose fees and compensation to the extent not prohibited by federal and state law. The parties agree that lawful, future fees and compensation may be applied to Facilities placed in the Public Way pursuant to this License. The City reserves the right to charge such lawful fees and compensation retroactively from the date such Facilities were first placed in the Public Way without a license or permit. Licensee reserves the right to bring a legal challenge to such fees and compensation.

- B. Licensee shall pay taxes for telecommunications services that are subject to taxation.
- C. This License grants Licensee the right to use the Public Way only to the extent the City itself possesses such rights. This License does not eliminate the necessity of Licensee to obtain approvals legally necessary to use the Public Way from owners, other than the City, of property interests in the Public Way or adjacent to the roadway system located within the City.
- D. This License does not confer an exclusive right or privilege to occupy or use the Public Way for delivery of Telecommunications Service or any other purpose. The City reserves all rights to use the Public Way for any purpose not prohibited by law, including the provision of Telecommunications Services, and all rights to grant authorizations to any other Person(s), including any providers of Telecommunications Service(s), to use the Public Way.
- E. Except as may be explicitly provided herein, this license does not: i) convey any right, title, or interest in the Public Way; ii) divest the City of any interest in the Public Way; or iii) constitute any warranty of the City's title or legal interest in the Public Way.
- F. Nothing in this Telecommunications License shall be deemed or construed to estop or limit the City from exercising any regulatory, police, governmental, or legislative function pursuant to applicable law, which powers include, but are not limited to, the authority to enact regulations, ordinances, rules, and orders not prohibited by state or federal law that affect the Public Way or Licensee's use of the Public Way.
- G. This Telecommunications License does not permit the Licensee to operate a cable system or to provide cable service, as those terms are defined by Section 602 of the Cable Communications Policy Act of 1984, as amended (47 U.S.C. Section 522), and the Licensee agrees that it will not operate a cable system or provide cable service in the City unless it obtains authorization from the City.
- H. This Telecommunications License only permits the Licensee, upon obtaining required approvals and permits, to place its Telecommunications Facilities in those portions of the Public Way approved by the City.
- I. Telecommunications Facilities installed in the Public Way pursuant to this Telecommunications License shall not be construed either to give Licensee any right, title, interest in, or legal claim for, use of the Public Way, except to the extent expressly set forth in this Telecommunications License for the term of this Telecommunications License, or to diminish in any manner any right or claim the City may have to prohibit, limit, condition or regulate Licensee's use of the Public Way.

- J. This Telecommunications License shall not be construed to authorize the Licensee to sell, lease or otherwise transfer any conduit, or to sell fiber in the Public Way to any Person or entity for the conduct of any private business, and the sale, lease or other transfer of conduit or fiber in the Public Way to any Person or entity shall not be construed as a License from the City to any such Person or entity for the use of the Public Way for any purpose, unless such Person or entity has obtained a license or other appropriate authorization the City may require for such use.

## **Section 2. Definitions**

The following terms, phrases, and their derivations shall have the meaning given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural include the singular, and words in the singular include the plural.

- A. **Telecommunications License or License** means this Telecommunications License; together with all Appendices attached hereto and all amendments or modifications thereto.
- B. **Person** means any individual or any association, firm, partnership, joint venture, corporation or other legally recognized entity, whether for profit or not for profit, but shall not mean the City.
- C. **Public Way** means the surface of, and the space above and below all public streets, avenues, highways, boulevards, roads, alleys, lanes, bikeways, shoulders, squares, bridges, viaducts, tunnels, causeways and sidewalks existing now or hereafter within the City and the surface of and space above and below land lying adjacent to such public improvements which the City can legally use for such public improvements. Franchisee's ability to use Public Way granted in this License is limited to the extent of the City's right, title, interest, and/or authority to grant a License to occupy and use such property for a Telecommunications System.
- D. **Telecommunications** means the transmission, between or among points specified by the user of information of the user's choosing, without change in the form or content of the information as sent and received.
- E. **Telecommunications Facilities or Facilities** means the plant, equipment and property, including, but not limited to, any and all transmission facilities, poles, cables, wires, optical fibers, amplifiers, pedestals, antennae, electronics, electrical conductors, conduits, ducts, subways, manholes, fixtures, appliances, and other appurtenances that are used in connection with the provision of Telecommunications Services in the City.
- F. **Telecommunications Service(s)**, for purposes of this Telecommunications License alone, means the providing or offering for rent, sale, lease, or other value, transmittal of Telecommunications between or among points, regardless of the facilities used. For purposes of this Telecommunications License, Telecommunications Service also shall be deemed to include internet service. In the event a court or state or federal agency of binding jurisdiction were to conclude that internet service provided pursuant to this Telecommunications License is not a Telecommunications Service, Licensee agrees that all terms and conditions of this Telecommunications License will nonetheless be applicable to and binding on Licensee and

the provision of internet service over Licensee's facilities in the Public Way, except to the extent expressly prohibited by law. In the event a court or federal or state agency were to conclude that this Telecommunications License is no longer binding or applicable as a result of such court or agency conclusion that internet service is not a Telecommunications Service, Licensee agrees that it will immediately enter into good faith negotiations with the City over the terms of a License or other authorization, to the extent the City is not prohibited by applicable law from imposing such License or other, authorization, permitting Licensee to provide internet service over its facilities in the Public Way, and that Licensee is not authorized to continue to provide internet service over such facilities without such License' or authorization. Telecommunications Service shall not be deemed to include cable service, as that term is defined by Section 602 of the Cable Act, 47, U.S.C. § 522. Internet service shall not be deemed a cable service for purposes of this Telecommunications License.

- G. **Telecommunications System** means the plant, Telecommunications Facilities, real property (including interests in real property), and personal property (tangible and intangible) used by Licensee to provide Telecommunications Service to, from, within or across any part of the City.

### **Section 3. Information Required**

Prior to applying for an excavation permit to install any portion of its Telecommunications Facilities, or at any time during the term of this Telecommunications License as may be reasonably requested by the City, the Licensee shall provide the following information to the City, in whatever detail the City reasonably requires:

- A. the identity and legal status of the Licensee and its affiliates performing work in the City's Public Way;
- B. the name and contact information for the officer, agent, or employee of Licensee responsible for communications with the City;
- C. a good faith description, subject to change in the sole discretion of Licensee provided that Licensee provides the City prior notice of such change, of Licensee's existing and proposed Telecommunications Facilities within the City within the next five years and the major routes proposed for such Facilities during such time period, provided, however, that with respect to any future plans by the Licensee subject to this Section 3.C, the City shall treat such plans as confidential information pursuant to Section 9 of this Telecommunications License, to the extent permitted by applicable law;
- D. a statement as to whether the Licensee intends to provide local telecommunications service and whether the services provided are subject to a license tax; and
- E. A description of the services or facilities that the Licensee will offer or make available to City government and to other public, educational, and governmental institutions within the City.

### **Section 4. Location/Relocation of Facilities/Information Regarding Facilities**

- A. As between Licensee and the City, the City shall determine in its discretion whether: (a) Franchisee's Facilities may be placed underground, aboveground, or may not be placed at all in a particular location; and (b) Licensee has met any condition or requirement under this Section 4.
- B. Licensee shall generally locate its Facilities underground. Licensee shall locate its Facilities in existing ducts if such exist within or adjacent to the Public Way and have the capacity to hold Licensee's fibers and if placement in such ducts is approved by the City and by the duct owner. The cost of use of such ducts shall be borne by Licensee.
- C. If existing ducts that have the capacity to hold Licensee's fibers do not exist in or adjacent to the Public Way, or if use of such ducts is not reasonably approved by the City or the duct owner after the Licensee has exercised good faith efforts to obtain such use, Licensee may locate its Facilities underground upon demonstrating the following to the City's satisfaction: that sufficient space exists in the Public Way to accommodate such Facilities without interfering with existing or future utilities or trees or other large vegetation; that excavation will not unduly disrupt use of the Public Way; and that excavation, after restoration, will not negatively impact the condition of the Public Way.
- D. If Licensee desires to place Telecommunications Facilities above ground it shall document, in its request, the reasons for such placement and whether there are existing overhead lines in place and existing poles that can accommodate the facilities.
- E. Upon placement of any Telecommunications Facilities in the City, Licensee shall become a member of N.C. One Call, and shall maintain such membership for the duration of any License or license with the City.
- F. Licensee shall, for the duration of this Telecommunications License, at no cost to the City, relocate or remove portions of its Telecommunications Facilities located in the Public Way in the event the Public Way is closed, or if the City, in its sole discretion, determines that the location of Franchisee's facilities interferes with the efficient provision of utility services to City residents, or conflicts with any highway, sidewalk, trail, or utility project. or project, however funded, or with any project receiving public funding administered by the City, or that the Public Way can be better or more efficiently utilized by the removal and relocation or consolidation of certain existing facilities.
- G. All Telecommunications Facilities in the Public Way will be maintained in safe repair and condition throughout the term of this Telecommunications License.
- H. At any time throughout the period of this License, the City may request and Licensee shall provide the City a map and other information that may be requested by the City regarding the location and capacity of Franchisee's Facilities.
- I. Nothing in this Telecommunications License abrogates the right of the City to perform or cause to be performed any construction, maintenance or repair of public improvements. Except when damage is solely and directly caused by the City's gross negligence, the City and its officers, officials, employees, agents, attorneys, consultants and independent contractors shall not have any liability to the Licensee or any reseller, lessee, or other user of

Licensee's Telecommunications Facilities, Licensee for any damage to Licensee's Telecommunications Facilities that occurs as a result of or in connection with any public improvements that: (a) in whole or in part are financed by the City; or (b) are executed pursuant to a contract with the City; or (c) are dedicated to, or are accepted for maintenance by, the City when completed. Gross negligence shall not include, among other things, any rupture, break or other damage to Licensee's Telecommunications Facilities: (a) resulting from the City's efforts to repair public improvements in the event of an emergency as determined by the City, or (b) resulting from the City's efforts to construct, operate, maintain or repair public improvements if the City has provided Licensee an opportunity to protect, alter or relocate such Telecommunications Facilities by a certain date and Licensee refuses or neglects to protect, alter or relocate such Telecommunications Facilities by such date. For purposes of this Section 4.1, public improvements shall include, but not be limited to, water, sewer, and stormwater facilities, and streets. Liability, when imposed for gross negligence, shall be limited to the direct cost to Licensee of repair and/or replacement of damaged Telecommunications Facilities and, without limitation, shall not include indirect costs, economic losses, or consequential damages to Licensee or any reseller, lessee or any other user of Licensee's Telecommunications Facilities resulting from damage to such Telecommunications Facilities.

- J. Except in the case of emergency repairs, before the Licensee constructs, installs, upgrades, repairs or removes Telecommunications Facilities along a portion of the Public Way, Licensee shall provide at least seven days advance written notice to Persons located along such portion of the Public Way. Licensee shall provide written notice to each such Person by (i) posting written notices along such portion of the Public Way, which notices shall be at least three feet by two feet and posted not more than 500 feet apart; or (ii) first class mail to each such Person; or (iii) written notice left at each such Person's dwelling unit or business; or (iv) personally communicating with each such Person at his or her dwelling unit or business.
- K. At the termination, expiration,; or forfeiture of this License, Licensee shall, at the City's request, remove its Facilities at its own cost, and restore the Public Way as provided below.

## **Section 5. Excavation Permits, Construction, Inspection, Restoration, and Removal**

- A. Prior to the placement of any Telecommunications Facilities in the Public Way, the Licensee shall first obtain an excavation permit from the City's Public Works Department. Engineering maps, showing the location and depth of the Facilities in the Public Way and method of placement of the Facilities shall be provided to the City as part of Licensee's permit request. At the City's request, as built maps in such further detail as the City may require shall be provided no more than sixty (60) days following the conclusion of construction, or at any other time as the City may require. Licensee will advise the City of any significant discrepancy between construction plans and actual construction. Licensee also shall advise the City if, during construction of Facilities, such construction is within six feet (6') of any water or sewer facilities.
- B. Engineering, construction and as-built documents shall be provided in hard copy [paper] and/or electronic copy as requested by the City.

- C. In addition to design maps and as-built maps, Licensee shall provide such other information regarding existing facilities in the Public Way as the City may require, in such detail as the City may require. Information that is a trade secret, proprietary, or confidential and that is identified as such by Licensee upon submission shall be maintained as confidential by the City, to the extent authorized by Public Records law and other applicable federal and state laws.
- D. As part of its application for an excavation permit, Licensee shall also provide a traffic control plan that meets both City and State specifications. Approval of such plan by the City shall not constitute a determination that the traffic control measures are sufficient to protect the public.
- E. Licensee shall take all precautions necessary to protect the public from increased risks or disruptions resulting from installation of Licensee's Telecommunications Facilities. Licensee shall maintain adequate warning signs, barricades, signals, other devices, and traffic control personnel necessary to provide for the safe and efficient flow of traffic. Licensee shall immediately repair and restore any damage to property resulting from installation, maintenance, or repair of, or other work performed on its Telecommunications Facilities. Licensee shall be responsible for any claims made for actual, consequential, or other damages to persons or property resulting from such work.
- F. Licensee shall comply with all applicable federal, state and local regulations, such as the National Electrical Code, National Electrical Safety Code, Fiber Optic Cable Installation Specifications, 1987 Telecommunication Industry Committee standards, traffic safety/lane closure rules and construction requirements promulgated by the City and the North Carolina Department of Transportation (NCDOT) as amended.
- G. The City may inspect the Franchisee's Telecommunications Facilities and restoration work performed by Licensee. Licensee shall notify the City when it has completed each permitted portion of its Telecommunications Facilities; or at such other time the City requests. Following inspection, Licensee shall make any changes or repairs directed by City. However, the City shall not require changes to be made in the location of Telecommunications Facilities if such have been installed in accordance with the location shown on Franchisee's approved construction permit.
- H. Without limitation, Licensee shall restore land, utility lines, other improvements, ground cover, and landscaping disturbed by excavation and construction in the Public Way to the standards specified by the City. When the State has an interest in the Public Way, Licensee shall perform restoration work that meets either the standards specified by the owner or the standards specified by the City, whichever are more stringent. If the City determines that it is necessary to restore additional Public Way adjacent to the portion of the Public Way that has been disturbed in order to restore the entire Public Way in the area of the excavation to current City standard and/or in a similar functional condition as it was in prior to the excavation, Licensee shall make the improvements or changes directed by the City to such portions of the Public Way adjacent to the excavated area. Where permanent restoration is impractical because of weather or other circumstances, temporary restoration followed by permanent restoration may be required. Restoration shall be accomplished within the time

approved by the City at the time the excavation permit is approved. If Licensee does not complete the restoration during this period, the restoration may be completed by the City and the cost of such restoration shall be promptly reimbursed by Licensee under the provisions of Section 11 below.

- I. Where restoration work performed by Licensee proves to be inadequate over time, as determined in the sole, reasonable discretion of the City, Licensee shall perform additional restoration work as directed by the City. The City may determine that restoration work is inadequate for a period of three years from the date of completion of the excavation work for Licensee's Facilities. Inspection and approval by the City immediately after installation of facilities does not constitute a waiver of the City's rights to determine that the restoration work is not adequate over time and needs to be remedied by Licensee.
- J. The City may approve the performance of repair or emergency work without issuance of an excavation permit. When it is impossible for Licensee to give the City notice of repair work because of the unexpected, emergency nature of such work, Licensee may perform such work provided notice is given to the City as promptly as possible after the commencement of such work and a permit request is submitted retroactively or within 2 working days.

#### **Section 6. Fees, Compensation and Costs**

- A. Licensee shall pay the City a fee of \$7,500.00 to partially compensate the City for the costs, including but not limited to City staff time and costs of outside consultants, of preparing, negotiating, and executing this Telecommunications License. Licensee shall also pay the then-current fee for an excavation permit at such time as each request for a permit is submitted. The City acknowledges that the amount of such fee may be subject to limitations under federal and/or state law.
- B. Licensee shall pay a reasonable fee for inspection of Licensee's Telecommunications Facilities or restoration work completed by Licensee, which inspection may be performed by City employees or by an independent contractor. Inspection shall include, but not be limited to, inspection and monitoring of facility placement, traffic control, soil compaction, and restoration. If the fee is not charged prior to inspection, Licensee shall pay the fee to the City within 30 days of receipt of invoice. The City acknowledges that the amount of such fee may be subject to limitations under federal and/or state law.
- C. Any invoices for fees charged by the City shall be sent to the person and address shown in Section 14, Notice.
- D. Licensee acknowledges that facilities installed pursuant to this Telecommunications License are subject to lawful fees and compensation for the use of the Public Way that the City may impose in accordance with the limitations of applicable state and federal law, including Section 253 of the Federal Communications Act. Such fees may be in addition to fees that the City may charge for permits and inspections heretofore described in Section 6 of this License. The City reserves the right to charge such lawful fees and compensation retroactively from the date the Licensee first placed its Telecommunications Facilities in the



Public Way. Licensee shall have the right to challenge fees and compensation charged by the City.

## **Section 7. Assignment**

- A. Licensee may not assign or transfer control of its rights hereunder except as provided in this Section. If Licensee assigns or transfers control of its Telecommunications Facilities subject to this agreement to a subsidiary or affiliate of licensee; or effects an assignment or transfer for financing purposes, Licensee must ensure in a written instrument that such assignment or transfer is subject to the rights of the City pursuant to this Telecommunications License and applicable law. In addition, Licensee shall give the City written notice of the assignment or transfer of control not less than thirty (30) days prior to the date on which the assignment or transfer of control becomes effective.
- B. Except as provided above, Licensee may not sell conduit to another entity unless, prior to such sale, the City has granted a Telecommunications License to such entity, or consented to a modification of this License regarding the conduit being transferred. The City shall not unreasonably withhold its consent.
- C. No assignment, transfer of control, or sale of Licensee's Telecommunications Facilities as described in A and B above, or lease of Telecommunications Facilities, shall discharge Licensee from liability or responsibility for the performance of Licensee's obligations under this Telecommunications License unless the City has consented to such discharge.
- D. Licensee shall ensure that any lease of telecommunications facilities contains a provision prohibiting lessee from asserting any legal claim against the City or its agents, officials, officers, and employees regarding the Telecommunications Facilities being leased, including but not limited to any negligence claims.

## **Section 8. Performance Bond**

- A. Within ten (10) days following the award of the License, the Licensee shall deposit with the City a bond issued by a surety authorized to do business in North Carolina, in the amount of two hundred and fifty thousand dollars (\$250,000), or as specified by the City. The form and content of the bond shall be approved by the City. The bond shall be used to insure the faithful performance of the Licensee of all provisions of this Telecommunications License, and compliance with all lawful orders, permits and directions of any agency, commission, board, department, division or office of the City exercising jurisdiction over the Licensee's acts or defaults, and payment by the Licensee of any claims, liens, or fees due the City. The bond shall be kept continuously in force for the time period of this License plus an additional year. The City may, in its discretion, decrease the amount of or eliminate this requirement in consideration of the financial stability of Licensee.
- B. If the Licensee fails to pay to the City any fees or compensation, penalties, claims, liens, or liquidated damages, owed to the City after thirty (30) days' notice to pay to the City, the City may remedy such failure by the Licensee by demand on the bond. Without limitation as to other bases for making demands on the bond, the City may also make demand on the bond if it has had to perform work, or pay money, that Licensee should have paid, or performed,

under this License. Upon such request for payment under the bond, the City shall notify the Licensee of the amount and date thereof.

- C. In the event that amounts are withdrawn by the City pursuant to this Section, the Licensee shall restore the bond to the amount it was prior to the City's claim within ten (10) business days of notification by the City of its withdrawal against the bond.
- D. In the event Licensee proposes construction activities which represent a level of construction activity or restoration for which the City, in its sole reasonable and good faith discretion deems Licensee's existing bond to be inadequate security, the City may direct Licensee to post such additional security as the City deems appropriate. Such additional security shall be maintained until the City notifies Licensee that it is no longer necessary.
- E. The rights reserved to the City with respect to the bond are in addition to all other rights of the City, whether reserved by the License, or authorized by law, and no action, proceeding or exercise of a right with respect to such a bond shall affect any other right the City may have except to the extent payment satisfies a City claim.
- F. The bond shall contain the following endorsement: *"It is hereby understood and agreed that this instrument shall not be canceled by the surety nor the intention not to renew be stated by the surety until thirty (30) days after receipt by the City, by registered mail, from surety of a written notice of such an intention to cancel or not to renew "*
- G. The initial bond shall be for a period of not less than 18 months. In the event that time period does not cover the time this Telecommunications License is effective, plus an additional twelve months, Licensee shall renew the bond not less than thirty (30) days prior to its expiration and provide a copy of the renewal to the City.

## **Section 9. Books and Records – Inspections**

- A. The City may inspect the books, records, maps and plans related to Telecommunications Facilities in the Public Way owned, controlled, possessed, or operated by Licensee or its affiliates for the following purposes: (1) to enforce compliance with the Telecommunications License and applicable local law or regulation; (2) in the exercise of any lawful regulatory power; or (3) in connection with the City's management of the Public Way, including, but not limited to, the location of Telecommunications Facilities in the Public Way. Material subject to inspection may be duplicated at a City facility unless the City agrees to inspection and copying at some other place. Material that the City requires Licensee to produce under this Section shall be produced upon reasonable notice, no later than thirty (30) days after the request for production. Requests for extensions of time to respond shall not be unreasonably denied. Proprietary material shall be provided to the City in accordance with Section 9.B of this Telecommunications License.
- B. Licensee may request that the City treat records containing trade secrets or proprietary information as confidential under the North Carolina Public Records law. To the extent authorized by the Public Records law and other applicable state and federal law, the City shall maintain the confidentiality of information designated "proprietary" by the Licensee.

- C. Upon request by the City, Licensee shall provide copies of filings made at the Public Utilities Commission of North Carolina related to its Telecommunications System in the City and copies of all information pertinent to payment of taxes.

## **Section 10. Insurance**

- A. On or before the effective date of the License, Licensee shall provide proof of the required insurance set forth below. The Licensee shall maintain this insurance throughout the License term. Insurance shall include:
1. Workers' Compensation coverage for all employees with Statutory Limits In compliance with applicable state and federal laws. The policy shall Include Employers' Liability with a limit of five hundred thousand dollars (\$500,000) for each occurrence.
  2. Commercial General Liability with a combined single limit of not less than five million dollars (\$5,000,000) per occurrence, ten million (\$10,000,000) annual aggregate. Coverage shall include premises/operations and products/ completed operations, broad form property damage, XCU Coverage, contractual liability, and independent contractors.
  3. Business Auto Policy with a combined single limit of not less than five million dollars (\$5,000,000) per occurrence. This shall include owned, hired, and non-owned vehicles.
  4. The limits under subsections (2) and (3) above may be reached by any combination of primary and excess insurance. Self-insurance retentions in excess of one million dollars require approval of the City of Durham's Risk Manager
- B. The City of Durham shall be named as an additional insured for any claims related to this Telecommunications License. An original of the endorsement to this effect must be submitted with insurance certificates. Certificates shall be mailed to City of Durham, Attention Risk Manager, 101 City Hall Plaza, Durham, North Carolina, 27701. Sixty (60) days' notice is required prior to any change in the coverage.
- C. Licensee shall increase the amount of coverage and expand the types of coverage provided upon reasonable written request by the City. Primary insurance shall be provided by a company authorized to do business in North Carolina.

## **Section 11. Remedies**

- A. **Cumulative.** In addition to the remedies provided for in this section, either party may exercise all rights available under the law. All remedies provided under law and under this License shall be cumulative unless otherwise expressly stated. The exercise of one remedy shall not foreclose use of another, nor shall it relieve the Licensee of its obligations to comply with the Telecommunications License. Remedies may be used singly or in combination.
- B. **Forfeiture.** In addition to any other rights set out elsewhere in this Telecommunications License, the City reserves the right to declare a forfeiture of this License, and all of Licensee's rights arising hereunder, in the event that the Licensee does not comply with any

material provision of this Telecommunications License and does not cure such non-compliance under Section D below.

- C. **Reimbursement to the City.** In the event Licensee fails to restore the Public Way disturbed by the installation or maintenance of the Licensee's facilities, or does not restore the Public Way or adjacent areas to the standards contained herein or specified by the City, or does not complete restoration in a timely manner, and does not cure any such failure pursuant to Section D below, or causes any other damage to property within the Public Way or adjacent to the Public Way owned by the City or by other persons that it does not remedy or cause to be remedied in a timely way, as determined in the sole discretion of the City, the City shall have the right to perform or cause to be performed repair and restoration of the Public Way and/or adjacent areas and/or property within or adjacent to the Public Way, and to pay any additional damage claims caused by Franchisee's actions where such claims have not been paid by Licensee. The City shall issue an invoice to Licensee for the cost of any such repair or restoration performed or caused to be performed by the City and for any damages for which the City has paid. Licensee shall reimburse the City for said costs plus actual administrative costs within thirty (30) days of receipt of any such invoice. Failure by the Licensee to pay said claim within thirty (30) days shall be cause for the City to exercise its prerogatives to declare forfeiture, collect under the performance bond, or exercise any other remedy available under the law. Licensee reserves the right to dispute any such invoice subsequent to payment thereof.
- D. **Notice and Opportunity to Cure.** The City shall give Licensee thirty (30) days written notice of its intent to exercise its forfeiture rights under this Section, stating the reasons for such action. If Licensee cures the problem within the thirty (30) days' notice period, or if the Licensee initiates substantial effort to remedy the stated problem and diligently continues those efforts in such thirty day period, and is likely to cure any problem within a reasonable period of time, as determined in the sole discretion of the City, the City shall not declare a forfeiture under this Section.
- E. **Court Action.** In the event the Licensee brings a court action challenging any forfeiture declaration or termination of this Telecommunications License by the City ("Forfeiture Action"), the City agrees that it will stay execution of the Forfeiture Action pending any court action by Licensee challenging the Forfeiture Action and a final court order on such challenge ("Final Court Order"). A Final Court Order as described in this paragraph is a court order that adjudicates the substantive issues in the court action brought and that is no longer subject to appeal in the respective state or federal judicial system in which the court action was brought. If the Final Court Order upholds the Forfeiture Action and Licensee fails to cure any and all material breaches giving rise to the Forfeiture Action within thirty (30) days after the Final Court Order, the City may enforce the Forfeiture Action. , Licensee shall not enjoy any further rights to install Facilities within the Public Way pursuant to this Telecommunications License, but otherwise the City will stay execution of the Forfeiture Action until the Final Court Order. In the event Licensee has not transferred the Telecommunications Facilities within 180 days of the Final Court Order to an unaffiliated person reasonably acceptable to the City and in accordance with Section 7 of this Telecommunications License, the City may enforce the Forfeiture Action and the Licensee shall cease its use of the Telecommunications Facilities within the City.

- F. **Facility Removal.** After the termination, expiration, or forfeiture of this License, Licensee shall, at the City's request, remove its Facilities at its own cost, and restore the Public Way as provided in Section 5 of this Telecommunications License.

## **Section 12. Third Party Rights**

Nothing under this Telecommunications License shall be construed to give any rights or benefits in this Licensee to anyone other than the City and the Licensee, and all duties and responsibilities undertaken pursuant to this License are for the benefit of the City and the Licensee and not for third parties.

## **Section 13. Choice of Law and Forum**

This License is made in Durham County, North Carolina, and shall be governed by and construed in accordance with the laws of North Carolina and the United States of America. The exclusive forum and venue for all actions arising out of this License shall be the North Carolina General Court of Justice in Durham County or the United States District Court for the Middle District of North Carolina.

## **Section 14. Notice**

Any notice provided for under this License shall be sufficient if in writing and delivered personally to the following addressee or deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

### To the City:

City Manager

City of Durham

101 City Hall Plaza Durham, NC 27701 Fax: (919) 560-4949

### Copy to:

Public Works Director

Department of Public Works

City of Durham

101 City Hall Plaza Durham, NC 27701 Fax: (919) 560-4316

### To the Company:

Tommy Jacobson, COO & VP Network Infrastructure

MCNC, a non-profit corporation

3021 E Cornwallis Rd

PO Box 12889

RTP, NC 27709 Email: [tjacobson@mcnc.org](mailto:tjacobson@mcnc.org)

Phone: 919-248-1178

Fax: 919-248-1101

## **Section 15. License in the Entirety**

This License is entire and not severable, except as provided in Section 16 below. A material breach of any part is a breach of the whole. Any breach of this License shall be subject to the provisions of Section 11 herein.

## **Section 16. Severability**

If any section, subsection, sentence, clause, phrase or portion of this License is for any reason invalidated by federal or state law, or held invalid or unconstitutional by a court of competent jurisdiction, such portion shall be deemed a separate, distinct, independent, and severable Provision and such holding shall not affect the validity of the remaining portions thereof.

## **Section 17. Non-discrimination**

The Licensee shall not discriminate in any manner on the basis of age, race, sex, handicap, disability, color, creed, or national origin.

## **Section 18. Indemnity**

- (1) To the extent not prohibited by law, the Licensee shall defend, indemnify, and save harmless the City (including but not limited to the municipality, and its Council, employees, agents, and independent contractors) from and against all Charges to the extent that they arise from, in connection with, or out of this License, or as a result of Licensee's action or inaction in constructing, operating, or maintaining its Telecommunications Facilities in the City of Durham, or from, in connection with, or out of any claim brought by any reseller, lessee or other user of Licensee's Telecommunications Facilities, as a result of any damage to Licensee's Telecommunications Facilities by the City that occurs as a result of or in connection with any public improvements set forth in Section 4 of this Telecommunications License. In performing its duties under this Section, the Licensee shall at its sole expense defend the City with legal counsel reasonably acceptable to the City.
- (2) Definitions. As used in this Section, "Charges" means claims, judgments, costs, damages, losses, demands, liabilities, obligations, fines, penalties, royalties, settlements, and expenses. Included without limitation within "Charges" are (a) interest and reasonable attorneys' fees assessed as part of any such item, and (b) amounts for alleged violations of sedimentation pollution, erosion control, pollution, or other environmental laws, regulations, ordinances, rules or orders.
- (3) Limitation of the Licensee's Obligation. This Section shall not require the Licensee to indemnify or hold harmless the City against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the gross negligence of the City.
- (4) This indemnification is not intended, and shall not be interpreted, to reduce the obligations otherwise agreed to by Licensee elsewhere in this Telecommunications License.

## **Section 19. Delays and Failures Beyond the Control of Licensee**

Notwithstanding any other provision of this Telecommunications License, the Licensee shall not be liable for delay in performance of, or failure to perform, in whole or in part, its obligations pursuant to this Telecommunications License due to strike, war or act of war (whether an actual declaration of war is made or not), insurrection, riot, act of public enemy, accident, fire, flood or other act of God, technical failure, sabotage or other event, where the Licensee has exercised all due care reasonable in the circumstances in the prevention thereof, to the extent that such causes or other events are beyond the control of the Licensee and such causes or events are without the fault or negligence of the Licensee. In the event that any such delay in performance or failure to perform affects only part of the Franchisee's capacity to perform, the Licensee shall perform to the maximum extent it is able to do so and shall take all steps within its power to correct such cause(s). The Licensee agrees that in correcting such cause(s), it shall take all reasonable steps to do so in as expeditious a manner as possible. The Licensee shall notify the City in writing of the occurrence of an event covered by this Section 19 within five (5) business days of the date upon which the Licensee learns of its occurrence.

#### **Section 20. Current Enforceability**

By execution of this Telecommunications License, the Licensee accepts the validity of the terms and conditions of, and the process leading to, this Telecommunications License, and waives and relinquishes, to the maximum extent permitted by law, its right to challenge this License except as hereafter provided. This waiver shall not include a claim that the License is discriminatory under Section 253(c) of the Federal Telecommunications Act. In addition, Licensee does not waive its rights to challenge the City's interpretation of the License, future City determinations that Licensee is in breach of a provision of the License, and the extent of, and remedies for, such breach, or rights specifically given within this Telecommunications License to bring legal challenges to future fees or compensation.

#### **Section 21. Reservation of Rights**

The parties reserve all rights each possesses under the law that are not expressly waived herein. The failure of a party to insist upon a strict performance of any of the terms or provisions of this Telecommunications License, or to exercise any option, right or remedy under this Telecommunications License, shall not be construed as a waiver or as a relinquishment for the future of such terms, provision, option, right or remedy, but the same shall continue and remain in full force and effect. A party shall not be deemed to have made a waiver of any provision of this License unless such waiver is expressly denominated as such, is signed by an authorized representative of the waiving party, which party, in the case of the City, shall be the City Manager, and refers to the provision or portion of this License being waived.

#### **Section 22. E-Verify Compliance**

The contractor represents and covenants that the contractor and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (NCGS). In this E-Verify Compliance section, "contractor," "its subcontractors," and "comply" shall have the meanings intended by NCGS 160A-20.1(b). The City is relying on this section in entering into this contract. The parties agree to this section only to the extent authorized by law. If this

section is held to be unenforceable or invalid in whole or in part, it shall be deemed amended to the extent necessary to make this contract comply with NCGS 160A-20.1(b).



IN WITNESS WHEREOF, the undersigned have caused this Telecommunications License to be executed.

**MCNC**

ATTEST:

\_\_\_\_\_  
\_\_\_\_\_  
Secretary  
(Affix corporate seal.)

By: \_\_\_\_\_  
\_\_\_\_\_  
President

**State of** \_\_\_\_\_  
**County of** \_\_\_\_\_

I, a notary public in and for the aforesaid county and state, certify that \_\_\_\_\_ personally appeared before me this day and stated that he or she is \_\_\_\_\_ Secretary of \_\_\_\_\_, a non-profit corporation, and that by authority duly given and as the act of the corporation, the foregoing agreement with the City of Durham was signed in its name by its \_\_\_\_\_ President, whose name is \_\_\_\_\_, sealed with its corporate seal, and attested by him/herself as its said Secretary or Assistant Secretary. This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

My commission expires:

\_\_\_\_\_  
\_\_\_\_\_  
Notary Public

ATTEST:

**CITY OF DURHAM**

\_\_\_\_\_  
By: \_\_\_\_\_

preaudit certificate, if applicable \_\_\_\_\_